

IN THE COURT OF APPEALS OF TENNESSEE
AT NASHVILLE
September 11, 2008 Session

MARY BETH HORAN v. IAN CHARLES McLEOD

**Appeal from the Circuit Court for Rutherford County
No. 501917B Royce Taylor, Judge**

No. M2007-01762-COA-R3-CV - Filed February 4, 2009

After Mother's death, Aunt of child filed a dependency and neglect proceeding against Father in juvenile court. Father and Aunt signed an agreed order on August 4, 2004, settling the matter. On April 25, 2005, Father filed a motion for relief under Tenn. R. Civ. P. 60.02 seeking to vacate the August 4, 2004 order and parenting plan. He later filed a petition with the juvenile court to vacate the August 4, 2004 agreed order and parenting plan pursuant to Tenn. R. Juv. P. 34. Both the Rule 60.02 motion and the Rule 34 petition were denied. Father appealed to circuit court. The circuit court heard arguments on the motion and petition and denied them both. Father appealed, claiming that he should have gotten a de novo trial in circuit court and alleging procedural irregularities in the juvenile court proceedings prior to the August 4, 2004 agreed order. We affirm the circuit court, finding that Father received the hearing he was due in circuit court and that the time for appealing the juvenile court proceedings leading up to the August 4, 2004 agreed order has long passed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Circuit Court Affirmed

ANDY D. BENNETT, J., delivered the opinion of the court, in which FRANK G. CLEMENT, JR., J and RICHARD H. DINKINS, J., joined.

Sandra Jones, Nashville, Tennessee, for the appellant, Ian Charles McLeod.

Bert W. McCarter, Murfreesboro, Tennessee, for the appellee, Mary Beth Horan.

MEMORANDUM OPINION¹

¹Tenn. R. Ct. App.10 states:

This Court, with the concurrence of all judges participating in the case, may affirm, reverse or modify the actions of the trial court by memorandum opinion when a formal opinion would have no precedential value. When a case is decided by memorandum opinion, it shall be designated "MEMORANDUM OPINION," shall not be published, and shall not be cited or relied on for any reason in any unrelated case.

This is a custody dispute between a child's father, Ian McLeod ("Father"), and the child's maternal aunt, Mary Beth Horan ("Aunt"). The child's parents were divorced in September 1999 in Rutherford County. Mother was named the primary residential parent in the parenting plan. Unfortunately, Mother died on March 24, 2004. Aunt, who had possession of the child at the time of Mother's death, filed an Emergency Petition for Temporary Custody, Permanent Custody and Ex Parte Restraining Order on March 30, 2004, alleging the child was dependent and neglected and claiming that, during Mother's illness, Aunt had been the primary caregiver for the child. The juvenile court entered an ex parte protective custody order which restrained Father from interfering with Aunt's possession of the child until a hearing scheduled for April 1, 2004. On that date, a hearing was held, but only part of the proof was heard. The court set some visitation for Father with the child but reserved all other matters for a hearing scheduled for April 16, 2004. That hearing was continued later to June 3, 2004. The parties entered into an agreed order on April 26, 2004, which provided for Father's visitation, stated that the child would testify at the final hearing, appointed a guardian ad litem for the child and reserved other matters for the June 3, 2004 hearing. This was followed by another order in June providing for Father's visitation and continuing the hearing until July 9, 2004. The July 9, 2004 hearing was later continued to August 4, 2004.

On August 4, 2004, the parties entered an agreed order and parenting plan in which Father was named the "primary custodian." Father became dissatisfied, and on April 25, 2005, he filed a motion for relief under Tenn. R. Civ. P. 60.02 seeking to vacate the August 4, 2004 order and parenting plan. This motion was set for a hearing on August 10, 2005. On June 1, 2005, Father filed a petition for writ of certiorari and supersedeas and other relief in the Circuit Court for Rutherford County. Continuing his multipronged attack on the August 4, 2004 order, Father filed a petition with the juvenile court on July 21, 2005, to vacate the August 4, 2004 agreed order and parenting plan pursuant to Tenn. R. Juv. P. 34.

The hearing on the Rule 60.02 motion and Rule 34 petition was held on August 10 and 11, 2005. Both requests for relief were denied.² Although the order was lodged with the juvenile court clerk on September 23, 2005, it was not signed by the judge until November 21, 2005 (with the handwritten notation "Nunc Pro Tunc 08/11/05") and was filed with the clerk on November 23, 2005. Father filed a notice of appeal to the circuit court on October 25, 2005, noting that he was appealing from the order lodged with the juvenile court on September 23, 2005. The record on appeal was not sent to the circuit court clerk for several months. Apparently at the circuit court clerk's request, a second notice of appeal was filed on March 1, 2006.

Little happened in 2006 to advance this case. Aunt filed a motion for a mental evaluation of Father and for the appointment of a new guardian ad litem in October 2006. Father responded to the motion on January 17, 2007, opposing both a mental evaluation and the appointment of a

²Also on August 10, 2005, the juvenile court issued a DCS referral and investigative order and an order removing the child from the custody of Father based on allegations that the child was afraid of Father. The DCS investigative report was filed the next day, pursuant to the court's order. The report did not find any cause for concern. The removal order was vacated by an order dated October 20, 2005.

guardian ad litem. Father also moved to set a date for a hearing. That motion was heard January 19, 2007, and the circuit court set the matter for oral argument on March 20, 2007. That hearing did not take place until April 16, 2007. The circuit court viewed its role as a limited one:

Before this court now is the appeal from the November 23, 2005, order entered by Juvenile Court denying the petitioner's T.R.C.P. Rule 60.02 motion . . . While the petitioner's motion cites T.R.C.P. Rule 60.02 , it appears that T.R.J.P. Rule 34(b) is the applicable rule. Thus, this appeal will treat the T.R.C.P. Rule 60.02 motion as a T.R.J.P. Rule 34(b) motion.

The circuit court denied Father's Rule 60 motion in a "letter ruling" filed on May 10, 2007. A second "letter ruling" clarified that the court also considered Father's Rule 34 motion and denied that as well. The order based on these "letter rulings" was entered June 28, 2007, and Father appealed to this court seeking a remand for a full de novo trial.

Issues of law are examined de novo by the appellate court with no presumption of correctness. *Mooney v. Sneed*, 30 S.W.3d 304, 306 (Tenn. 2000). Father claims that he is due a de novo hearing before the circuit court based on the following language from Tenn. Code Ann. § 37-1-159(a): "any appeal from any final order or judgment in an unruly child proceeding or dependent and neglect proceeding, filed under this chapter, may be made to the circuit court that shall hear the testimony of witnesses and try the case de novo." The statute further requires such an appeal to be perfected within ten days of the juvenile court's disposition. Tenn. Code Ann. § 37-1-159(a). Viewing this matter as an appeal of the August 4, 2004 agreed order, Aunt argues that Father filed his appeal too late.

This matter is strikingly similar to the fact situation in *In re T.B.H.*, No. M2006-01232-COA-R3-JV, 2007 WL 1202411 (Tenn. Ct. App. April 20, 2007). In *In re T.B.H.*, the father filed a Tenn. R. Civ. P. 60 motion on January 20, 2004, asking the juvenile court to set aside its November 22, 2002 order on the basis that the order was void. *In re T.B.H.*, 2007 WL 1202411, at *2. The juvenile court denied the Rule 60 motion on April 20, 2004, and the father appealed to this Court. *Id.* On January 11, 2005, this Court determined that the case should have been appealed to the circuit court pursuant to Tenn. Code Ann. § 37-1-159(a) because the appeal involved a dependency and neglect proceeding in the juvenile court. *Id.* at *5. Consequently, the appeal was transferred to the Circuit Court for White County pursuant to Tenn. Code Ann. § 16-4-108(a)(2).³ *Id.* On April 10, 2006, the White County Circuit Court heard the father's Rule 60 motion de novo, and on May 10, 2006, the Circuit Court denied the Rule 60 motion holding that the White County Juvenile Court had subject matter jurisdiction and that its order of November 22, 2002 was not void. *Id.* The Court of Appeals affirmed the circuit court's decision denying the father's Rule 60 motion. *Id.*

³By mistake, the opinion cites Tenn. Code. Ann. § 16-4-101(a)(2).

In the instant case, as in *In re T.B.H.*, the order appealed ⁴ was the juvenile court's order of November 23, 2005, denying Father's Tenn. R. Civ. P. 60.02 motion and Tenn. R. Juv. P. 34 petition, not the agreed order of August 4, 2004. The circuit court ruled against Father "[a]fter hearing oral arguments of the parties." Father argues that Tenn. Code Ann. § 37-1-159(a) requires a de novo evidentiary hearing. We decline to accept Father's invitation to interpret Tenn. Code Ann. § 37-1-159(a) to allow for an entirely new trial on a matter that had become final merely by filing an appeal from his Tenn. R. Civ. P. 60.02 motion and Tenn. R. Juv. P. 34 petition. Pursuant to Tenn. Code Ann. § 37-1-159(a), Father was entitled to a de novo hearing of these motions and that is what he got.⁵

Father also seeks to argue procedural irregularities in the 2004 juvenile court proceedings and problems with the August 4, 2004 agreed order. We need not address these matters because the time to appeal the August 4, 2004 order ran long ago.

Costs of appeal are assessed against Father, for which execution may issue if necessary.

ANDY D. BENNETT, JUDGE

⁴No challenge is made to the unusual way in which this matter was appealed.

⁵We note that Father did not appeal the circuit court's ruling on the Tenn. R. Civ. P. 60.02 motion or the Tenn. R. Juv. P. 34 petition. Rather, he argues that he should have received a de novo trial in circuit court.